

A Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor v Mohd Rafizi Ramli and another appeal

**B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NOS W-02(IM)(NCVC)-1094-06 OF 2016 AND
W-02(IM)(NCVC)-1095-06 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
3 NOVEMBER 2017**

C *Civil Procedure — Striking out — Application for — Tort of defamation action — Application to strike out defence and counterclaim — Whether impugned paragraphs sustainable and obvious to merit striking out — Whether court would be able to make findings as to whether impugned statements were comments purely by looking at pleadings — Whether witnesses needed to be adduced — Rules of Court 2012 O 18 r 19*

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E *Tort — Defamation — Libel — Defence of fair comment — Remarks made during speech — Whether remarks defamatory of claimants — Whether remarks qualified as fair comment — Whether words complained of were comments — Whether words consisted of or included inferences of facts — Whether comments matter of public interest — Whether comments based on facts — Whether comment was one which a fair-minded person could honestly make on facts proved — Whether defence of fair comment successful*

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G The first appellant was the Prime Minister of Malaysia while the second appellant was his wife ('the plaintiffs'). They filed an action at the High Court for defamation against the respondent ('the first defendant') and one Chan Chee Kong ('the second defendant'). According to the plaintiffs, the first defendant made defamatory remarks against them in his speech at a forum when the latter suggested that the plaintiffs stole and pocketed people's monies from the removal of oil subsidies for their personal gains. The speech was then uploaded by the second defendant on Youtube and Media Rakyat's webpage and Facebook. In addition to filing two separate defences, namely fair comment and qualified privilege, the defendants also counterclaimed for damages in tort and abuse of court process and victimisation. The plaintiffs filed two separate applications to strike out part of the defendants' counterclaim and defence of fair comment ('encls 16 and 21'), on the ground that the defendants' statements were not comments but pure allegations of facts which did not qualify to sustain a defence of fair comment. Therefore, the plaintiff submitted that the defence of fair comment ought to be struck out. Enclosures 16 and 21 were dismissed on the grounds that: (a) the impugned paragraphs were not clearly unsustainable and not plainly obvious to merit

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striking out; and (b) the court would not be able to make its findings as to whether the impugned statements were not comments purely by looking at the pleadings. Hence the present appeals.

Held, allowing appeals:

- (1) To constitute a defence of fair comment: (i) the words complained of were comments, although they may consist of or include inferences of facts; (ii) the comment was a matter of public interest; (iii) the comment was based on facts; and (iv) the comment was one which a fair-minded person could honestly make on the facts proved. The court is fully-entitled to decide that a particular statement was a comment and not a bare or naked statement of facts when it contains a person's belief for his conclusion, which was based on or drawn from certain facts. However, it is not always necessary to decide whether a particular statement is a comment or otherwise by adducing evidence from witnesses (see paras 17–19). A
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- (2) By just looking at the pleadings, it became clear that the statement made by the first defendant was not an opinion or what the first defendant believe, or his comment on any particular fact. When a comment was based upon facts, it could not be on the facts invented by the maker himself. It must rest upon facts which were presumed to be true. If the facts never existed, then the defence must fail. The defendants were duty-bound to particularise what were the facts relied upon in order to support that the allegations made were their true beliefs or opinions and not to leave to the plaintiffs and the court to speculate, pick and choose for them (see paras 19 & 21). E
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- (3) The impugned statement showed clearly and plainly that it was not a comment but a mere allegation or statement of facts. Looking at the speech as a whole and the first defendant's defence, none of the facts pleaded supported the allegation that the plaintiffs stole and pocketed people's monies from the removal of the oil subsidies for their personal gains to enable characterisation that the statement was a comment or an opinion premised upon some facts. Without the underlying facts which could form the basis of a comment, the impugned statement could not be said to be a comment that could qualify for a defence of fair comment (see para 23). G
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- (4) The High Court judge erred in law in deciding that this was not a plain and obvious case for striking out pursuant to O 18 r 19 of the Rules of Court 2012. There was no necessity for further enquiries to decide whether or not the spoken words in this case were comments or otherwise (see para 24). I

A [Bahasa Malaysia summary]

Perayu pertama ialah Perdana Menteri Malaysia manakala perayu kedua ialah isteri beliau ('plaintif-plaintif'). Mereka memfailkan satu tindakan di Mahkamah Tinggi bagi fitnah terhadap responden ('plaintif pertama') dan seorang bernama Chan Chee Kong ('defendan kedua'). Menurut **B** plaintif-plaintif, defendan pertama membuat pernyataan memfitnah terhadap mereka dalam ucapannya dalam satu forum apabila beliau mengatakan **C** plaintif-plaintif mencuri dan memasukkan duit rakyat dalam poket mereka hasil penyingkiran subsidi minyak bagi kepentingan peribadi mereka. Ucapan ini kemudian dimuat naik oleh defendan kedua dalam Youtube dan laman web dan Facebook Media Rakyat. Selain memfailkan dua pembelaan berasingan iaitu komen berpatutan dan perlindungan bersyarat, defendan-defendan turut menuntut balas ganti rugi di bawah tort dan bagi salah guna proses mahkamah dan pemangsaan. **D** Plaintif-plaintif memfailkan dua permohonan berasingan untuk membatalkan sebahagian tuntutan balas defendan-defendan dan pembelaan komen berpatutan ('lampiran 16 dan 21'), atas alasan pernyataan-pernyataan defendan-defendan bukan komen tetapi dakwaan fakta semata-mata yang tidak mewajarkan pembelaan komen berpatutan. Oleh itu, **E** plaintif menghujahkan pembelaan komen berpatutan harus dibatalkan. Lampiran 16 dan 21 ditolak atas alasan: (a) perenggan-perenggan yang dipertikaikan jelas bukan tidak boleh dikekalkan dan bukan jelas mewajarkan pembatalan; dan (b) mahkamah tidak boleh membuat dapatannya tentang sama ada pernyataan-pernyataan yang dipertikaikan bukan komen hanya dengan melihat pada pliding. Oleh itu, rayuan ini difailkan. **F**

Diputuskan, membenarkan rayuan-rayuan:

- G** (1) Untuk membentuk pembelaan komen berpatutan: (i) perkataan yang diadukan mestilah komen, walaupun kesemuanya mungkin mengandungi atau meliputi inferens fakta; (ii) komen tersebut adalah hal perkara kepentingan awam; (iii) komen tersebut berdasarkan fakta; dan (iv) komen tersebut adalah sesuatu yang orang munasabah boleh, dengan jujur, fahami berdasarkan fakta yang dibuktikan. Mahkamah berhak sepenuhnya untuk memutuskan bahawa satu-satu pernyataan itu adalah komen dan bukan pernyataan fakta semata-mata yang mengandungi kepercayaan seseorang bagi kesimpulannya, yang dibuat atau disimpulkan daripada satu-satu fakta. Walau bagaimanapun, bukanlah selalunya perlu untuk memutuskan sama ada satu-satu pernyataan itu adalah komen atau sebaliknya dengan mengemukakan keterangan saksi-saksi (lihat perenggan 17–19).
- H** **I** (2) Dengan hanya melihat pliding sahaja, pernyataan yang dibuat oleh defendan pertama jelas bukan pendapat atau apa yang defendan pertama percayai atau komennya tentang apa-apa fakta. Apabila satu-satu komen dibuat berdasarkan fakta, ini tidak boleh berdasarkan fakta yang direka

- oleh pembuatnya sendiri. Komen tersebut mestilah bersandar pada fakta yang dianggap benar. Jika fakta tersebut tidak wujud, maka pembelaan seharusnya gagal. Defendan-defendan mempunyai tugas memperihalkan apa-apa fakta yang menjadi sandaran untuk menyokong bahawa dakwaan-dakwaan yang dibuat adalah kepercayaan mereka sendiri atau pendapat-pendapat dan bukan membiarkan plaintiff-plaintiff dan mahkamah membuat spekulasi atau memilihnya (lihat perenggan 19 & 21). A
- (3) Pernyataan yang dipertikaikan jelas menunjukkan bahawa ini bukan komen atau dakwaan semata-mata atau pernyataan fakta. Melihat keseluruhan ucapan dan pembelaan defendan pertama, tiada satu pun fakta yang diplidkan menyokong dakwaan bahawa plaintiff-plaintiff mencuri atau memasukkan wang rakyat ke dalam poket mereka hasil penyingkiran subsidi minyak bagi kepentingan mereka sendiri untuk membolehkan pengkategorian bahawa pernyataan yang dibuat adalah komen atau pendapat berdasarkan beberapa fakta. Tanpa fakta terselindung yang boleh membentuk asas satu-satu komen, pernyataan yang dipertikaikan tidak boleh dikatakan komen yang boleh menjadi pembelaan komen berpatutan (lihat perenggan 23). B
- (4) Hakim Mahkamah Tinggi terkhilaf di bawah undang-undang dalam memutuskan ini bukan kes yang jelas untuk pembatalan di bawah A 18 k 19 Kaedah-kaedah Mahkamah Tinggi 2012. Tiada keperluan bagi persoalan lanjut untuk memutuskan sama ada, atau tidak, perkataan-perkataan yang diucapkan adalah komen atau sebaliknya (lihat perenggan 24).] C
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Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9281–9311.

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 597–835. G

Cases referred to

Broadway Approvals Ltd and another v Odhams Press Ltd and another [1965] 2 All ER 523, CA (refd) H

Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services [2009] 3 MLJ 665; [2009] 4 CLJ 113, CA (folld)

Datuk Seri Mohammad Nizar Jamaluddin lwn Utusan Melayu (M) Bhd [2014] 2 CLJ 605, HC (folld)

Henry Wong Jan Fook v John Lee & Anor [1976] 1 MLJ 231, FC (refd) I

Hunt v Star Newspaper Co Ltd [1908] 2 KB 309, CA (folld)

Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1, PC (refd)

Kemsley v Foot and Others [1952] 1 All ER 501, HL (refd)

Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390, HC (folld)

- A *Meeran Leebaik Maullin & Anor v J Mohamed Ismail Marican & The Straits Printing Works* [1926] 2 MC 85 (folld)
S Ashok Kandiah & Anor v Dato' Yalumallai Muthusamy & Anor [2011] 1 CLJ 460, CA (refd)

B **Legislation referred to**

Rules of Court 2012 O 18 r 19, O 78 r 3(2)

- C *Mohd Hafarizam Harun (Nik Nuraisha Alia Hanafi with him) (Hafarizam Wan & Aisha Mubarak) in Civil Appeal Nos W-02(IM)(NCVC)-1094-06 of 2016 and W-02(IM)(NCVC)-1095-06 of 2016 for the appellants.*
Ranjit Singh (Sun & Michele) in Civil Appeal No W-02(IM)(NCVC)-1094-06 of 2016 for the respondent.
Ng Wai Yen (Yeoh & Joanne) in Civil Appeal No W-02(IM)(NCVC)-1095-06 of 2016 for the respondents.

D **Rohana Yusuf JCA (delivering judgment of the court):**

- E [1] The first plaintiff is the Prime Minister of Malaysia and the second plaintiff is the wife of the first plaintiff. They filed this suit against the defendants for defamation.

- F [2] The alleged defamatory remarks were made during a forum in Bandar Tun Razak, Kuala Lumpur on 3 November 2014. At that forum the first defendant delivered a speech on issues relating to 'Oil Subsidies and the Subsequent Effects'. That speech was said to have been uploaded by the second defendant himself or by his servants or agents onto Media Rakyat's Youtube channel at <https://www.youtube.com/watch?v=pgVM9qbndalam> dalam poket bagi Rosmah belanja.mUA and Media Rakyat's web page at www.mediarakyat.net which entitled *Rafizi Ramli: Kenapa Kita pertahankan subsidi Minyak*. This was later shared by the second defendant or his servants or agents on Media Rakyat's Facebook page at <https://www.facebook.com/mediarakyatnet?fref=ts> (to be collectively referred to as 'the recording').

- H [3] The recording contains, inter alia, the following words which are alleged to be defamatory of the plaintiffs:

- I ... saya tanya berkali-kali bila nak turun harga minyak takkan bila harga pasaran naik, cepat-cepat kamu naikkan bila turun, duit untung itu kamu simpan dalam poket bagi Rosmah belanja. Mana aci!
- ... tiap-tiap bulan kerajaan UMNO Barisan Nasional jimat satu ribu juta, satu ribu juta tahu tak banyak mana satu ribu juta boleh beli dua puluh cincin mahal Rosmah. Satu cincin dia dua puluh juta lebih. Satu ribu juta saya kata pulangkan balik kepada rakyat. Sebab itu duit rakyat, bukan duit bapak kamu punya.
- ... masalahnya kalau duit minyak tu sampai dalam poket dia dulu, kalau sampai

- seratus pakcik, yang sampai kepada rakyat lima ringgit. Sembilan puluh lima ringgit masuk kocek dia dengan masuk beg tangan Rosmah. Sebab itu kita kata dalam Negara Malaysia untuk kita pastikan harta kekayaan minyak itu sampai terus kepada rakyat mesti ada subsidi minyak kerana hanya dengan subsidi minyak dia tak masuk poket Najib dulu dia pergi kepada rakyat ...
- [4] The defendants filed two separate defences and in both of which, they raised the defence of fair comment and qualified privilege. The defendants also counterclaimed for damages in tort on abuse of process and victimisation.
- [5] At the High Court, the plaintiffs filed two separate applications to strike out part of the defence and counterclaim of the defendants. Enclosure 16 is an application by both plaintiffs to strike out the pleaded defence of fair comment in paras 24, 25, 26 and 26A of the first defendant's amended defence and counterclaim. Enclosure 21 is an application to strike out the defence of fair comment pleaded in paras 25, 26 and 27 of the second defendant's defence and counterclaim. The main ground of the plaintiffs' applications are premised on the legal issue that the statements made by the defendants in the recording, are not comments but pure allegations of facts, which do not qualify to sustain a defence of fair comment. Therefore, learned plaintiffs' counsel submitted, the pleaded defence of fair comment by the defendants are obviously unsustainable and liable to be struck out.
- [6] Since the issues involved in both applications are essentially similar and grounded on the same material facts, parties agreed for encl 16 to be heard by the learned judge first, the outcome of which, would bind the other application in encl 21.
- [7] On 15 April 2016, the High Court dismissed encl 16 which consequently led to the dismissal of encl 21. In dismissing the application, the learned trial judge found that the impugned paragraphs were not clearly unsustainable and were not plainly obvious to merit striking out. Her Ladyship opined that the court would not be able to make its finding as to whether the impugned statements were not comments purely by looking at the pleadings. According to the learned judge, in order to determine so, the court would have to have evidence adduced and heard before the court.
- [8] On this decision the plaintiffs are appealing before us. We have heard the appeals and had unanimously allowed the same. We now set out our reasons for our decision.
- [9] As we have alluded to earlier, the main thrust of the striking out application in both enclosures is premised on the legal issue that a defence of fair comment must be grounded on comments and not statement of facts.

- A Comments must inevitably be based on certain facts. It was further submitted by learned plaintiffs' counsel that the statements made by the first defendant are not comments in nature, but instead they are pure allegation of facts. Learned counsel cited the following paragraph as an example to contend that
- B the statements made by the first defendant in the recording, are not grounded on any fact to constitute comments. It was further submitted that the statement as produced below are clearly statements of facts and do not contain any comment or opinion by the maker, the first defendant:
- C tahu tak banyak mana satu ribu juta boleh beli dua puluh cincin mahal Rosmah. Satu cincin dia dua puluh Juta lebih. Satu ribu juta saya kata pulangkan balik kepada rakyat. Sebab itu duit rakyat, bukan duit bapak kamu punya.
- ... masalahnya kalau duit minyak tu sampai dalam poket dia dulu, kalau sampai seratus pakcik, yang sampai kepada rakyat lima ringgit. Sembilan puluh lima ringgit masuk kocek dia dengan masuk beg tangan Rosmah.
- D [10] It is a settled law that the defence of fair comment is applicable only when the statements made are comments based on certain facts. A statement purportedly based on 'facts' alone, or even if it is a case where there is a mixed of facts and comments, until a reader cannot distinguish which are the facts,
- E and which are comments, cannot be shielded under a defence of fair comment.
- [11] The scope of the defence of fair comment is well illustrated by the following observation of Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 where it was held that:
- F In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment.
- G [12] The Court of Appeal in *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L & G Consultants & Education Services* [2009] 3 MLJ 665; [2009] 4 CLJ 113 held that, fair comment does not cover assertion of facts but only comments or opinion. In order to succeed on a defence of fair comment the words complained of must constitute a comment or an expression of opinion. It was
- H found in that case that, the words complained of were clearly an assertion of facts for which the defence of justification would be more appropriate.
- I [13] The High Court case of *Datuk Seri Mohammad Nizar Jamaluddin lwn Utusan Melayu (M) Bhd* [2014] 2 CLJ 605 held that the statement 'Kelmarin, Mohammad Nizar menerusi akaun Twitter miliknya mengeluarkan komen Sultan Johor menyalahguna wang rakyat dalam pembelian nombor plat WWW 1 yang dibida pada harga RM520,000' is not a comment but a statement of fact. In *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390, it was held that in deciding whether the words are facts or comments the

applicable test 'is whether an ordinary reasonable reader on reading the whole article would understand the words as a comment or a statement of fact'. The court in that case had further observed that if the facts and comments were so mixed up that one cannot be distinguished from the other, then the defence of fair comment would not be available to the defendant.

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[14] In another Singapore case of *Meeran Leebaik Maullin & Anor v J Mohamed Ismail Marican & The Straits Printing Works* [1926] 2 MC 85 (at p 96, para 2) in determining whether the impugned document was a comment the court held that:

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Now in my opinion there is very little in this document which can claim to be comment at all. If it is examined it will be seen that hardly anywhere is there an expression of the writer's opinion, on the contrary, there are a number of allegations of fact which of course cannot be comment. Had the writers after setting forth the true facts drawn from the deduction that the plaintiffs were Quadianis or Kafirs such an opinion in view of the facts that have been established in this case viz that the plaintiffs belonged to an association the Anjuman-i-Islam which was a branch of the Woking Mission founded by Khwaja Kamal-ud-din an Ahmadiya, would I think have been comment which provided it was honest and without malice would have been entitled to immunity. In this document however the writers are most careful to express no opinion of their own.

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[15] Guided by the decided authorities above, we found it clear that in determining whether or not a particular statement before the court is a comment or otherwise, the court will have to examine the statement, applying the test of a reasonable person. And it is to be determined on whether or not that statement is an opinion, or a comment which is based on certain facts. There are plethora of authorities which propounded this axiomatic legal principle (see for instance *S Ashok Kandiah & Anor v Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460, *Kemsley v Foot and Others* [1952] 1 All ER 501, *Broadway Approvals Ltd and another v Odhams Press Ltd and another* [1965] 2 All ER 523).

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[16] We have scrutinised the Privy Council decision from Singapore in *Joshua Benjamin Jeyaretnam v Goh Chok Tong* [1989] 3 MLJ 1 cited to us by learned counsel for the defendants. Learned counsel contended that it would be difficult to differentiate between comments and assertion of facts, hence it would be crucial to identify whether the words complained of are purely assertion of facts, because anything which are not facts are comments. Thus, it would be important and necessary to hear evidence, before such a determination is made. Learned counsel also reminded us that since the plaintiffs are public figures, they are inevitably opened to comments.

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[17] Upon our assessment of the decision by the Privy Council in *Joshua*

A *Benjamin Jeyaretnam v Goh Chok Tong*, in our view the decision does not detract from the basic law on fair comment. In fact the decision is quite consonant with the trite position that such a defence applies firstly to a statement which is a comment and not a statement of fact. Lord Ackner when delivering the decision of the Privy Council in that case had examined the four elements below, which constitute a defence of fair comment:

- B (i) the word complained of are comments, although they may consist or include inferences of facts;
- C (ii) the comment is a matter of public interest;
- (iii) the comment is based on facts; and
- (iv) the comment is one which a fair minded person can honestly make on the facts proved.

D Because item (ii) above was not contested in that case, Lord Ackner proceeded to deliberate on the other three elements. Of relevance to the point of contention before us, is the first item, that is whether the statement in the recording is a comment or an opinion or a mere allegation of facts as contended by the plaintiffs. In deliberating on the issue of what amounts to a comment, His Lordship referred to the following paragraph in the 8th Edition of *Gatley on Libel and Slander* which states:

F Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticised while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If a statement appears to be one of opinion or conclusion, it is capable of being comment.

G [18] The difference between what is a comment and what is a statement of fact was demonstrated clearly in that case in relation to the impugned statement therein. It was in relation to a statement made by the respondent against the appellant who spoke at an inaugural meeting of the Singapore Democratic Party. At press conference, after stating that the appellant had spoken at the inaugural meeting, the respondent remarked that the appellant 'left the hall, and when he left the hall 200 participants left with him'. This part of the statement was found to be clear statement of fact by the court. The following part of the statement made by the respondent, however, was found to be a comment:

I I believe the exodus was engineered. I don't think it was a spontaneous exodus. If it was, it did not speak well for the SDP. It shows that the crowd, the limited crowd still looks toward Mr Jeyaretnam, for the time being as a leader of the opposition. But I am inclined to believe that the exodus was contrived by the leader of the Worker's

Party to show who is boss at this state. And surely Mr Chiam cannot take that trick lightly. A

In Their Lordship's judgment, it would be opened to the judge to take a view that an observation made following a statement of facts is either an expression of opinion or a conclusion or inference drawn from those facts, and therefore capable of being a comment. From this observation we can easily deduce that the court is fully entitled to decide that a particular statement is a comment and not a bare or naked statement of facts when it contains a person's belief for his conclusion which is based on, or drawn from certain facts. Having given our consideration to it, we found the case of *Joshua Benjamin Jeyaretnam v Goh Chok Tong* is clearly in support of the plaintiffs' proposition that the court has to firstly determine whether a statement is a comment or not, before determining whether a defence of fair comment becomes an available defence to a defendant. B C D

[19] The striking out of a defence of fair comment is not new, as it was allowed by the Federal Court in *Henry Wong Jan Fook v John Lee & Anor* [1976] 1 MLJ 231, on the ground that it was not pleaded as a defence of fair comment on a matter of public interest. It is therefore not always necessary, in our view for the court to decide whether a particular statement is a comment or otherwise by adducing evidence from witnesses. By just looking at the pleadings and the pleaded impugned statement in this case, it becomes plain and clear that the statement made by the first defendant is not an opinion or what the first defendant believe, or his comment on any particular fact. E F

[20] Learned counsel for the defendants further contended that the impugned speech must be taken in the context it was made. According to learned counsel when those statements were spoken, they were intended to be humorous, rhetorical or hyperbolic which allow the court to characterise them as comments and not facts. Learned counsel referred us to the 6th Ed of *Carter-Ruck on Libel and Privacy* on the part which discusses the application of a defence of fair comment to a matter of public interest. We have no doubt the defence applies only to matters of public interest. We are not determining whether or not the statement in the recording is a matter of public interest, here. As propounded in *Joshua Benjamin Jeyaretnam v Goh Chok Tong*, the first thing to look at in the application of the defence of fair comment is that the words spoken of must first of all constitute a comment. It is incumbent upon the defendants firstly to establish that the impugned statement is a comment, an opinion or what the defendants believe, to qualify for the statement to be characterised as a comment. Thus even before considering the other elements, which constitute fair comment as elucidated by Lord Ackner, it is vital that the first element be first established. Besides, it is opened to the defendants at trial to prove to the court that the statement was made in jest and cannot be G H I

A defamatory of the plaintiffs. That is quite another issue altogether, of which we are not called upon to determine in this appeal.

[21] Of course when a comment is based upon facts, it cannot be on the facts invented by the maker himself. It must rest upon facts which are presumed to be true. If the fact never exists then the defence must fail. In line with this requirement, O 78 r 3(2) provides for the procedural requisite for particularisation of the facts relied upon in support of any comment or opinion. The defendants here are duty bound to particularise what are the facts relied upon in order to support that the allegations made are their true beliefs or opinions, and not to leave to the plaintiffs and finally the court to speculate, pick and choose for them.

[22] It was also an argument of learned counsel for the defendants that the speech on 22 November 2014 was made at the time when the government's excessive spending and wastage and the plaintiffs' luxurious lifestyle had become known to the Malaysian public. If that is the intention of the defendants, the defendants could have pleaded that the statement made was based on such facts before a defence of fair comment could be invoked and relied upon. What is obvious to us is that, the pleaded defence of the defendants did not set out the facts relied upon and which form the basis of the purported comment as submitted.

[23] Our examination of the impugned statement in the present case shows clearly and plainly that it is not a comment but a mere allegation or statement of facts saying that the plaintiffs have stolen and pocketed people's monies from the removal of oil subsidies for their personal gains. If we were to look at the speech as a whole and the first defendant's defence in paras 24, 25, 26 and 26A, none of the facts pleaded therein support the allegation that the plaintiffs have stolen and pocketed people's monies from the removal of the oil subsidies for their personal gains to enable a characterisation that the statement is a comment or an opinion premised upon some facts. Without the underlying facts which could form the basis of a comment, the impugned statement cannot be said to be a comment that can qualify for a defence of fair comment.

[24] In our view the learned High Court judge had erred in law in deciding that this is not a plain and obvious case for striking out pursuant to O 18 r 19 of the Rules of Court 2012. On the facts of the present appeal and guided by the test propounded by the various authorities, we do not find any necessity for further enquiries to decide whether or not the spoken words in this case are comments or otherwise.

[25] We have reproduced para 24 of the first defendant's amended statement of defence and counterclaim below, where the first defendant merely pleaded

that:

Further and/or in the alternative if and so far as the Words complained of refer to the 1st and 2nd Plaintiffs, they are fair comment made by the 1st Defendant, as a Member of Parliament, in good faith and without malice upon a matter of public interest, which any fair-minded person could have arrived at. The 1st Defendant was in fact questioning the dubious fiscal and economic decisions of the Federal government, headed by the 1st Plaintiff as Prime Minister of Malaysia.

The above pleading as an example, undeniably fails to distinguish and detail out which part of the impugned statement is a fact and which part is an opinion or a comment. The defendant has thereby failed to adhere to the requirements of O 78 r 3(2) of the Rules of Court 2012.

[26] For all the reasons above stated we allowed both of the appeals by the plaintiffs. We allowed the application of the plaintiffs in encl 16 to strike out paras 24, 25, 26 and 26A of the first defendant's amended statement of defence and counterclaim which relate to the defence of fair comment. The decision of which would also apply to encl 21 where paras 25, 26 and 27 of the defence and counterclaim of the second defendant would stand struck out.

The appeals of both plaintiffs were allowed with costs in the cause.

Appeals allowed.

Reported by Afiq Mohamad Noor

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